

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2639

ORIGINAL

To be argued by
IRVING ANOLIK

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In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

PHILLIP STOLLER and MARTIN FRANK,

Defendants-Appellants,

JEROME ALLEN and ALFRED T. HERBERT,

Defendants.

**BRIEF FOR DEFENDANT-APPELLANT,
MARTIN FRANK**

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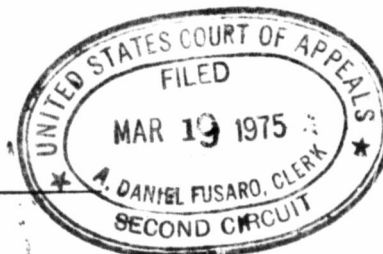


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

PHILLIP STOLLER and MARTIN FRANK,

Defendants-Appellants,

JEROME ALLEN and ALFRED T. HERBERT,

Defendants.

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DEFENDANT-APPELLANT MARTIN FRANK'S BRIEF

STATEMENT

Defendant-appellant Martin Frank, an attorney, appeals from a judgment of the United States District Court for the Southern District of New York rendered the 6th day of December, 1974, convicting him of one count, of a multi-count indictment, charging various security frauds under 15 U.S.C. Sections 77q(a), 77(x), 77j(b), and 78ff, and Rule 10b 5 [17 C.F.R. 240.10b 5] of the Rules and Regulations promulgated by the United States Securities and Exchange Commission under the Securities and Exchange

Act of 1934, and Title 18 United States Code, Section 1341.

Defendant-appellant Martin Frank was convicted solely of the first count which was a conspiracy under 18 U.S.C. § 371.

Honorable Harold Tyler, the United States District Judge before whom the case was tried, sentenced appellant Frank to a \$2,500 fine and two years imprisonment. Appellant is presently on bail pending the disposition of this appeal.

THE INDICTMENT

Count One of the indictment charged the defendants with conspiracy to violate the Federal Securities Laws (Title 15 United States Code, Sections 77q(a) and 78j(b) and mail fraud (Title 18 United States Code Section 1341).

Count Two charged the defendants with, in substance, fraud in the offer and sale of the securities of "Training With the Pros, Inc." in violation of Title 18, United States Code, Section 77q(a).

Counts Three through Six charged the defendants, in substance, with fraud in connection with the purchase and

sale of the stock of "Training With the Pros, Inc.", [hereinafter "TWP"], in violation of 15 U.S.C. § 78j(b) (c).

Counts Seven through Ten charged the defendants with the use of the mails to commit fraud in violation of 18 U.S.C. Section 1341.

Counts Eleven through Sixteen charged defendant-appellant Stoller only, with the making of false statements to the United States Securities and Exchange Commission in violation of 18 U.S.C. Section 1001.

Only Count One is material to defendant-appellant Frank on this brief. Notwithstanding this fact, however, we believe that he was severely prejudiced by being tried jointly with defendant-appellant Stoller with respect to the counts charging a violation of 18 U.S.C. § 1001, namely Counts Eleven through Sixteen of the indictment. A severance motion was denied.

It should be noted that defendant-appellant Martin Frank was convicted of no substantive count, but only of the conspiracy.

Count One, that is the conspiracy count of the indictment, briefly consists of the following allegations:

The defendants and certain unindicted co-conspirators allegedly schemed to obtain a large portion of a public

offering of the common stock of a corporation known as "Training With the Pros, Inc." [TWP].*

It was part of the alleged conspiracy that the co-conspirators and the defendants would "park" this stock in coded Swiss bank accounts, to make a large profit by later transferring the stock to other persons, and then to cause brokers to recommend purchases of this stock in order to raise its price so that such other persons could then sell the stock at a profit. The most important of the unindicted co-conspirators was Ramon D'Onofrio. Another alleged co-conspirator was E.H. "Bud" Moss, who had been president of TWP. He died before the trial.

Before the enlistment of co-defendants Phillip Stoller and Jerome Allen in the conspiracy, D'Onofrio met with Moss to discuss a public offering of the stock of TWP. The indictment also charges that D'Onofrio thereafter met with Stoller and Allen and hatched the illegal scheme. It alleges that D'Onofrio later had a meeting with defendant Martin Frank and discussed various methods

*The Court however, submitted the case on the theory of undisclosed underwriters which was not what the trial sought to prove.

for perpetrating the alleged fraudulent scheme.

It is extremely significant to note, because of a later point in this brief, that all of the events took place in 1968 and 1969. As a matter of fact, the last overt act is claimed to have occurred on or about May 21, 1969. The "means" paragraphs alleged various acts and transactions commencing prior to June 21, 1968, and culminating in May of 1969.

Perhaps some of the most important allegations in the indictment, especially from the point of view of appellant Frank, are claims that defendant Stoller and appellant Frank had various meetings with defendant Allen and co-conspirator D'Onofrio. Supposedly at these meetings the conspiracy was hatched and the details were agreed upon, according to the indictment.

The Government, in its bills of particulars, proved unable, however, to state the dates when these meetings took place, thus preventing and frustrating the defense from gathering evidence contradicting the Government's claims. The defense was precluded, for example, from proving that an alleged meeting could not have taken place at the time claimed because Stoller was out of town at the time.

INTRODUCTORY

There are several points which are being advanced, any one of which we maintain warrants reversal of the judgment of conviction in respect to appellant Frank.

We wish at this juncture to also inform the Court that we adopt any arguments made on behalf of co-appellant Stoller which may be helpful to appellant, and we believe Stoller does vice versa.

We also incorporate by reference the appellant's motion for judgment of acquittal or for a new trial, filed herein, dated December 2, 1974, although much of it is included in one or more of the points raised infra. There are so many aspects of error to which this Court's attention should be drawn, that we have been disposed to highlight only some of them. Our omission to pin-point all of those raised in the said motion therefore, is not a renunciation thereof, but is necessitated by a need to keep this brief within controllable limits.

Since Stoller was convicted on all of the counts submitted, whereas Frank was found guilty on only one (conspiracy), we shall not go into an extensive recitation of the evidence at trial, but instead shall adopt the

statement of facts of co-appellant Stoller. We shall limit our brief to adverting to such aspects as are peculiarly relevant to Frank.

Among, but by no means all, the reasons we advance to seek reversal herein are the following:

1. The Government violated both the letter and spirit of Massiah v. United States, 377 U.S. 201, by prevailing upon the co-defendant Jerome Allen, a former client and "friend" of appellant's, to surreptitiously record a conversation the Government urged him to have with appellant, which took place in the law office shared by appellant and his own attorney, at a point in time after Frank's arraignment on his indictment.

Although the Court ruled the conversation inadmissible, the Government reaped the important alternative advantage of thereby keeping Frank off the stand for fear that the statement would be used for purposes of impeachment. (Harris v. New York, 401 U.S. 222).

2. The co-defendant Allen was quite understandably called to the stand by the co-appellant, Stoller, who was represented by a different attorney, and who was charged with more counts than Frank, and in differing contexts.

Allen testified as to a great deal of matters tending not only to exculpate Frank, but to give the strong impression that the trial prosecutor and the Government forced and threatened Allen into giving information and other material in support of the prosecution's case. Allen stuck to his story even on cross examination, and despite the fact that he faced a perjury indictment thereby, to say nothing of the fact that he had not yet been sentenced himself.

The Court below, incredibly, directed the jury to disregard all of the direct and cross examination of Allen which was favorable or exculpatory of Frank. It refused to instruct the veniremen to also disregard the rebuttal testimony of the Government impeaching Allen's credibility. Thus the "good" testimony vis-a-vis Frank was interred with Allen's departure from the stand, but the "evil" portion survived to "bury" Frank.

3. The Court refused to dismiss the indictment despite the fact that it could have been found several years earlier when an SEC investigation already uncovered the material which formed the basis of the indictment. The last overt act was about four and three-

quarter (4-3/4) years prior to the indictment.

The Government could not give specific information about the occurrence of certain events because of the length of time which had elapsed, and certainly memories had grown dim, documents had been destroyed or lost in all likelihood, and the defendant had been lulled into a false sense of security.

Most pertinent, however, is the fact that "Bud" Moss, the president of TWP had died in the interim. That he could have given important exculpatory evidence is assured by the fact that his testimony was taken at the SEC hearing, but the Court refused to admit this, despite its exculpatory nature.

4. Since the substantive counts in which Frank was charged (2 through 10), embraced essential language of the conspiracy count (Count 1), coupled with the fact that the substantive charges necessarily required the joint participation of two or more persons, we maintain that by virtue of his acquittal on all of the substantive charges, Frank cannot remain convicted on the conspiracy.

5. A severance of Counts 11-16 which only referred to Stoller was demanded by Frank since he was prejudiced

by much irrelevant testimony against Stoller being admitted which did not relate to him at all. The Court denied the severance.

6. Additionally, certain probable 3500 and "Brady" material was demanded of the Government, which it has refused to turn over.

7. The Court refused certain charges and gave others that were highly prejudicial and erroneous. Marilyn Herzfeld, who like D'Onofrio, was a Government witness, testified that D'Onofrio first met appellant much later than the witness D'Onofrio testified. Since the Government vouched for both so far as credibility is concerned, the Court should have charged that the jury must acquit if it believed Herzfeld and not D'Onofrio. The Court refused to do so.

8. After dismissing Paragraph 5(r) of Count 1, relating to \$15,000 which Frank allegedly received for his part in the case, the Government nevertheless referred to it in its summation, which the Court refused to correct in the charge.

9. The Court shifted the theory of the case in its charge to the surprise of appellants by indicating that

the case turned on the question of "undisclosed underwriters". The appellants had been defending on the ground of a conspiracy among the several defendants and conspirators to engage in the fraudulent sale and purchase of the TWP stock, that is to manipulate it.

There are other errors which we shall not detail at this time.

THE FACTUAL BACKGROUND

We have already indicated that since co-appellant Stoller was convicted on all counts that his brief will detail the facts of the case in more detail than we feel is required herein.

The main witness against Frank was D'Onofrio, who inculpated both Stoller and Frank. He allegedly met Frank in 1968, but Marilyn Herzfeld, another Government witness said that she was present in the middle of 1969 when D'Onofrio introduced himself to Frank (tt 1118).

The Government sought to paint Frank as the "architect" of the scheme (tt 20).^{*} Sorkin, the prosecutor, described in his opening, and through D'Onofrio and others, the alleged machinations of opening Swiss bank accounts

* The prefix "tt" means "trial transcript".

in various names and the artificial raising of the price of the TWP stock through the use of nominees.

But actually, Frank did not come into the picture until considerably after the alleged conspiracy was set up. Moss' testimony before the SEC, which the Court refused to admit, since he had died shortly before trial, would have exculpated Frank substantially by giving plausible reasons for the events. The Government's case referred to conversations with Moss, but the Court disallowed all of Moss' SEC testimony.

The fact that the "indication letter" (exh. 4) from Bank Hofmann was sent over to the U.S.A. on October 17, 1968, but the offering circular of TWP was not filed until October 25, 1968 was the subject of a great deal of comment and testimony. The fact of the matter is that Frank, according to Herzfeld, did not even meet D'Onofrio until the middle of 1969.

Allen's testimony, infra, was that it would have been absurd for Frank to tell him and the others to use "nominees" if they wanted to manipulate the stock, since Allen said that no one would have to tell this to an "old pro" like him (Allen).

Supposedly, Frank was to get \$15,000 as his share

of the scheme (Count 1, Para. 5(r)). The Government, however, consented to a dismissal of this charge since admittedly no proof thereof was adduced.

The Government, in its opening, said that D'Onofrio was a swindler and criminal and was facing "17 years in prison" (tt 31). As the testimony of Melvin Hiller indicated, D'Onofrio was promised about 2 years in Egland Air Base.* As we indicate infra, that is almost the exact sentence of incarceration which he got! It is inferable that the Government had reason to know this, if Hiller is accurate. Future events bore this out, so we assume his accuracy.

In his opening, the prosecutor referred to the post-indictment tape of Allen and Frank, which the Court refused to allow into evidence (tt 32, 33). This was an unfair tactic.

In our points of law hereinafter, we detail other relevant portions of the facts as are applicable to Frank.

As we shall indicate, infra, Jerome Allen, one of the conspirator-defendants was deeply involved in the indictment and in the opening remarks of the prosecution.

It was therefore surprising that the Government had not

* Hiller said that in Fall 1973, D'Onofrio told him he was being paid \$200-\$400 weekly by the Government; that he was traveling back and forth from Las Vegas Friday to Monday at Government expense; and that D'Onofrio said he was promised about 2 years imprisonment at Egland Air Base (tt 2323, 2324).

called him as a witness.

Mr. Gould, counsel for Stoller, quite properly and naturally summoned Allen as a witness. When Allen testified, it became clear why the Government wanted no part of him. As we detail infra, Allen painted a picture of subornation, trickery, threats and coercion on the part of the Government in bringing the indictment and in procuring and trying to procure Allen as its witness. Allen gave considerable exculpatory testimony concerning Frank. Allen, however, was not Frank's witness, and for all intents and purposes, he did not examine Allen.

The Government, although the election to join Frank and Stoller in one trial was its own, argued that the exculpatory testimony of Allen should be stricken since there was a "unitary" defense. The Court incredibly granted the motion and instructed the jury to disregard any exculpatory testimony of Allen's.

The record is bare of any evidence of a "unitary" defense. The charges were substantially distinguishable against Stoller and Frank, and they were represented by different lawyers. The Government therefore was able to

"penalize" the appellant because of its own choice in trying him jointly with Stoller, thus precluding a fair trial. The prosecution, in essence, maintained that Allen could not be called at all if it turned out that he would say anything favorable to the defendant Frank, even if Frank didn't use him as his own witness. This was the most incredible ruling counsel herein has ever seen.

ARGUMENTPOINT I

THE GOVERNMENT VIOLATED BOTH THE LETTER AND SPIRIT OF MASSIAH v. UNITED STATES, 377 U.S. 201, WHEN FOLLOWING APPELLANT FRANK'S INDICTMENT AND ARRAIGNMENT, THEY PROCURED THE COOPERATION OF CO-DEFENDANT, JEROME ALLEN, WHO HAD BEEN A FORMER CLIENT OF FRANK'S, TO GO TO THE LATTER'S OFFICE, ENGAGE HIM IN AN INCRIMINATING CONVERSATION WHICH WAS BEING RECORDED AND BROADCAST, AND THEN SEEK TO USE THIS EVIDENCE AGAINST APPELLANT.

SINCE AN INCRIMINATING STATEMENT WAS OBTAINED BY THIS HIGHLY IMPROPER METHOD, THE GOVERNMENT SUCCEEDED IN PREVENTING APPELLANT FRANK FROM TAKING THE WITNESS STAND IN HIS OWN DEFENSE FOR FEAR THAT THE INCRIMINATORY LANGUAGE OF THE TAPED CONVERSATION COULD THEN BE USED TO IMPEACH HIM. (HARRIS v. NEW YORK, 401 U.S. 222).

There are a number of errors which we have adverted to in this brief, but we submit that one of the most outrageous and glaring among them is the technique employed by the prosecution which violated the letter and spirit of Massiah v. United States, 377 U.S. 201 (1964).

The Government, following the indictment and arraignment of appellant Martin Frank, procured the cooperation of the co-defendant Jerome Allen. Since it was Allen's

desire to help himself as much as possible with respect to a good deal of prior and present criminality, he agreed, at the suggestion of the Government, to permit himself to be wired up and then go to appellant Frank's office and seek to engage him in an incriminating conversation concerning the very subject matter of the indictment which had recently been handed up.* The Court below held the conversation did indeed concern the instant case and not any separate investigation.

Allen, who the Trial Judge, Honorable Harold Tyler, described as a "Trojan horse" (Minutes of sentence, United States v. Jerome Allen, 74 Cr. 979, 74 Cr. 159, 73 Cr. 471, and 73 Cr. 747, February 21, 1975, Southern District of New York, page 13), was a reluctant participant in the unscrupulous scheme which the Government concocted following the indictment.

We submit that this tactic, employed knowingly and deliberately by the Government, is so shocking that this Court should reverse the conviction irrespective of any

* See testimony of Thomas Doonan (tt 1397, 1404-1407, 1427). Frank objected under Massiah (1433, 1434).

other error in the case (Cf: United States v. Toscanino, 500 F. 2d 267 (2 Cir. 1974), Spano v. New York, 360 U.S. 315 (1959)).

To see the prejudice in the proper perspective, we must recognize that if the defendant Frank took the stand in his own behalf, the tape recording which was made of his conversation with Allen, could be introduced, at the very least, for the purposes of impeaching his credibility. (Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954); Tate v. United States, 283 F. 2d 377 (D.C. Cir. 1960); and, United States v. Curry, 358 F.2d 904 (2 Cir. 1966).

But, see, Groshart v. United States, 392 F.2d 172 (9 Cir. 1968).

We feel it appropriate to interject at this point the fact that the Trial Judge ruled that the statement obtained following indictment, by Allen's devious conduct at the behest of the Government was inadmissible on the direct case of the prosecution, although it tried to use it on cross examination of Allen.

But returning to the dilemma upon the horns of which appellant found himself, Martin Frank was "damned if he took the stand" and "damned if he didn't". In effect,

the Government had to benefit by its own wrongdoing. This is obvious from the fact that if Allen could not reveal the statement on examination by the Government, the defense certainly would fear the statement would be introduced if Frank testified. If appellant Martin Frank took the stand in his own behalf, and certainly this would have been natural since he had never been convicted of a crime, he faced the distinct probability that the incriminatory portions of his conversation with Allen would be introduced against him for impeachment purposes.

The only other alternative, which is the one adopted at the trial, was to keep the appellant off the stand so that the jury would not be able to hear what might very well be interpreted as a highly incriminating statement.

Appellant Frank conceivably could have tried to explain away the incriminatory portions of the statement, but the risk was far greater than the benefit possibly to be achieved by attempting to do this. Moreover, the Government's outrageous action had created this predicament by riding rough-shod over Frank's rights.

Thus the Government succeeded in one of its objectives and that was to keep appellant Martin Frank from

taking the stand in his own behalf.*

In *1 Cooley, Const. Lim. (8th Ed.) 646*, Judge Cooley in this monumental work appropriately asserted:

"In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused

It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than impartial representatives of public justice."
(Emphasis added.)

Mr. Justice Roberts in *Sorrells v. United States*, 287 U.S. 435 (1932), in an opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred, stated (*id.* at 453):

"The efforts. . .to obtain arrests and convictions have too often been marked by reprehensible methods... ."

* Allen testified that the prosecutor told him that they must entrap and convict appellant -- that the case must be won (2661, 2946). See Point II.

Justice Roberts continued by referring to these methods as a "prostitution of the criminal law" (id. 287 U.S. at 457).

To explain the thrust of the Massiah problem, we ask this Court to bear in mind that the method used was not for the purpose of an investigation since that had terminated with the finding of the indictment. After all, the appellant had already been formally accused and was entitled to the benefit of counsel at all stages of any proceedings against him.

In the Massiah case, we must realize that we are not dealing with custodial interrogation as is the situation in such cases as Miranda v. United States, 384 U.S. 436 (1966), or in Escobedo v. Illinois, 378 U.S. 368 (1964).

Massiah established the doctrine that post-indictment statements may not be used against a defendant if they have been deliberately elicited by a law enforcement agent outside the presence of counsel.

Massiah had been indicted in federal court; he retained a lawyer, pleaded not guilty, and was admitted to bail. A second defendant, indicted with Massiah, surreptitiously decided to cooperate with the federal auth-

orities. A federal agent installed a radio in an automobile in which Massiah and the cooperating defendant were riding, and overheard their conversation. Massiah made certain incriminating statements to which the federal agent testified at Massiah's trial.

The Supreme Court of the United States held that Massiah's right to counsel and his privilege against self-incrimination were violated by the admission of the statements into evidence. The Court therefore reversed the conviction.

According to the opinion, the defendant Massiah was denied the basic protection of the Sixth Amendment guarantee "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." (Massiah v. United States, 377 U.S. at 206).

The Supreme Court in Massiah was careful to emphasize that it was not intending to foreclose, by its opinion, investigative activities by federal agents not related to the pending indictment - apparently the thrust of the opinion was that the statements received in the

course of the investigation could not be used in the prosecution of the crime for which the defendant was already under indictment.

We ask this Court to note that in the Court below, Judge Tyler ruled the statement inadmissible since he found that it clearly related to the subject matter of the indictment and was not referable to any other type of crime such as obstruction of justice. Moreover, it occurred in the law office appellant shared with his own attorney, Feldshuh.

Massiah was a natural extension of Spano v. New York, 360 U.S. 315 (1959).

There, too, an incriminating statement was obtained in the absence of counsel from Spano by law enforcement authorities following his indictment.

It is interesting to note that in the Spano case, Patrolman Bruno, a long-time friend of Spano's was used as a "Trojan horse" to lull him into a false sense of security and discuss the case, thus incriminating himself.

The same tactic was used in Massiah v. United States, supra, and we submit that in the case at bar, the exact

same ploy was also utilized.

The Supreme Court of the United States in Spano quoted John Gay's couplet:

"An open foe may be a curse, but a pretended friend is worse."

Certainly Allen was posing as a "friend" of the defendant herein.

Incidentally, at page 9 of the transcript of the conversation between Allen and Frank, to which we have been referring, the following statement by Frank is made in response to a remark by Allen:

"There's no question in my mind, and I know there is none in yours, that you paid me \$15,000 for telling you how to do the Training deal. There's no question in my mind. I had to tell you and Ray and Jerry."*

We think it pertinent to call this Court's attention to its recent decision in United States v. Badalamente, F.2d (2 Cir. NDS 1186-1205, Sept. Term 1973, Decided November 21, 1974), where the same dramatis personae, namely, Assistant United States Attorney Sorkin and Jerome Allen, were also involved. This Court reversed the

*It is apparent that "Jerry" is a mistake since we assume "Phil" was intended. Allen testified at trial that no \$15,000 was ever paid to Frank.

conviction of Herbert Yagid in that case, and we particularly commend this Court to its opinion, specifically with reference to footnote 1 on Slip Opinion page 5905 going on to 5906.

In Coopedge v. United States, 369 U.S. 438, the Supreme Court aptly proclaimed and cautioned (id. at 449):

"When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." (Emphasis ours.)

We therefore submit that the conduct of the Government in obtaining an incriminatory statement from a named defendant in a criminal case where he has already been indicted and arraigned, is so shocking that irrespective of any other error, it requires reversal.

Indeed, we would go so far as to suggest that just as in Mesarosh v. United States, 352 U.S., and in Lee v. Florida, 392 U.S. 378 (1968), it might very well be warranted to dismiss the indictment altogether so as to

teach the Government that it may not trifle with the rights of its citizens despite the temptation that may have offered itself to obtain an incriminating statement by using, as Judge Tyler described, a "Trojan horse".

In Mesarosh v. United States, 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

"This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in McNabb v. United States, 318 U.S. 332, the Supreme Court likewise declared:

"We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

POINT II

INCREDIBLE AS IT SEEMS, THE TRIAL JUDGE ACTUALLY RULED THAT ONLY THOSE PORTIONS OF CO-DEFENDANT ALLEN'S TESTIMONY WHICH WERE NON-EXCULPATORY OF DEFENDANT-APPELLANT FRANK COULD BE CONSIDERED BY THE JURY, AND THAT ANY EXCULPATORY SEGMENTS, OF WHICH THERE WERE MANY, MUST BE DISREGARDED BY THE JURY AND MUST NOT BE COMMENTED UPON IN SUMMATION BY APPELLANT. THIS DEPRIVED FRANK OF DUE PROCESS BY DEPRIVING HIM OF A FAIR TRIAL.

A.

THE GOVERNMENT SUCCESSFULLY ARGUED THAT IT WAS "UNFAIR" TO IT TO PERMIT ANY EXCULPATORY MATTERS IN THE TESTIMONY OF ALLEN TO BE CONSIDERED BY THE JURORS.

Apparently the Trial Judge and the prosecution thought that it was ipso facto unfair to the Government to permit any testimony of Jerome Allen to be considered which might be exculpatory of appellant Frank. The author of this brief believes that the learned Court and the prosecution were confusing the rule which bars "self-serving" declarations being elicited from one's own witness.

The point that the Court below and the prosecution missed is that Frank did not call Allen as Frank's witness. Nor did Frank even examine Allen on direct or cross.

The Government would raise a cry of outrage that would virtually "raise the proverbial roof" if the Court had ruled that any testimony of a witness which inculpated appellant must be disregarded, but that favorable utterances were all right.

The error of the Court below is made obvious by a reading of Washington v. Texas, 388 U.S. 14 (1967) which held it to be a denial of a Sixth Amendment right to compulsory process to bar an accomplice from testifying on behalf of a defendant. The Supreme Court explained:

"The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing."

The Supreme Court continued:

"To think that criminals will lie to save their fellows but not to obtain

favours from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."*

The Supreme Court further noted that the rule, such as that inexplicably adopted by the Court below, increased, rather than decreased the incentive to perjury.

Since both Stoller and Frank were joined in trial as co-defendants at the option of the Government, and through no fault of their own, the Government has no right to now "penalize" Frank because Stoller's attorney elicited matter from Allen that was exculpatory of Frank.

The rule below would in essence disqualify a co-defendant from being called to testify in favor of a defendant. For that matter, no testimony favorable to a defendant could ever be elicited by a co-defendant if the ruling below were to stand.

The Court below actually ruled (tt 3103-3103):

"THE COURT: ...You will not be entitled to rely on any exculpatory material that Allen gave in his testimony on direct or cross." (See tt 3170.)

* Allen had not yet been sentenced when he testified.

The Government confused the learned Judge below with nonsense about a "unitary defense" (tt 3077).

Milton Gould, an eminent attorney and scholar of the law, sought vainly to correct the incredible error, explaining that when he elicited matter from Stoller's witness, Allen, "I didn't become Mr. Frank's lawyer" (tt 3083).

The Court below concluded the discussions by granting the Government's motion and advising counsel that there could be no consideration of Allen's testimony concerning the fact that he had never given \$15,000 to Frank, or of anything else that was exculpatory (tt 3098, 3170-3171).

The actual instruction to the jury concerning the disregarding of Allen's testimony was so confusing and vague that it is submitted that the jurors could not help but assume that only the harmful portion of Allen's testimony vis-a-vis Frank could be considered, but that nothing helpful or exculpatory could be regarded as remaining in the case. Thus at tt 3170-1:

"THE COURT...The second thing is that you may recall that during the

testimony of Mr. Allen himself on both direct and cross he was asked and gave certain evidence about Mr. Frank, most particularly, as I recall it, in relation to the allegations that Mr. Frank was to receive \$15,000 for whatever role he played in the Training With the Pros transactions and certain other evidence about Mr. Frank, as Mr. Allen put it, some of which if not all of which tended to exculpate Mr. Frank.

For technical reasons I must instruct you that all of those questions and answers having to do with Mr. Frank are stricken and must be disregarded by you entirely. That is the testimony of Allen regarding Frank on both direct and cross is stricken and must be disregarded by you in deciding this case." (Emphasis supplied.)

The veniremen must necessarily have assumed that something dishonest in which Frank was a party had been perpetrated by Allen and probably with the complicity of Stoller, since his lawyer called Allen and did most of the questioning.

In addition, the jury likely assumed that Frank did receive the \$15,000. The prejudice was incalculable. It was an impossible "mental gymnastic" that had to be imposed on the jury (Bruton v. United States, 391 U.S. 123). Moreover, Frank was irretrievably prejudiced by an erroneous ruling concerning a situation that was wrought by

the co-appellant's perfectly proper Sixth Amendment right to call a witness.

Moreover, by singling out Frank, the jurors must have assumed that Frank had done something horrendous.

To exacerbate the situation more, the Court denied Frank's request to charge "42" that the jury also disregard the Government's rebuttal testimony attacking Allen's credibility.

Allen testified at great length that the trial prosecutor had threatened him with lengthy incarceration if he failed to be helpful, but with leniency if he cooperated and testified for the Government (tt 2575):

"...if I cooperated with you [Sorkin] I would get probably less than two years, and if I didn't you would arrange for consecutive sentencing."

At another point in his testimony, Allen declared that prosecutor Sorkin had been striving to "get Marty Frank" (tt 2574):

"On the Coatings case based upon what you told me if I cooperated to get Marty Frank, you would let me off easy."

Allen asserted that Sorkin refused to let him call a lawyer when he was brought to the prosecutor's office

(tt 2596). Further, he related that he was questioned at a time when he had just flown back from Europe and had not slept in three days. In this condition, he was ordered by the prosecutor to explain the "Training With the Pros" case (tt 2608).

Mr. Sorkin told Allen that it was important to Allen that the Government win its case against appellant, otherwise Allen could expect no leniency (2609).

As to conversation with his own attorney, Allen was permitted to claim privilege (2612).

He said that Sorkin told him that D'Onofrio was going to testify that Allen, Phingst, and Stoller met June 6, 8, 9, and 10 at the Eau au Lac Hotel in Switzerland. When Allen explained that his travel permit did not allow him to be there at that time, and that the dates were impossible, Sorkin nevertheless warned him to conform to D'Onofrio's version (tt 2661).

Sorkin also told Allen that D'Onofrio would testify that at a meeting, Frank told him to use nominees (2661-2662). Allen's vanity was offended by such a ridiculous situation saying (tt 2661):

"D'Onofrio would swear that he was at a meeting where Marty [Frank] supposedly told me, an old pro, to use nominees."

He, Sorkin, also ordered Allen to swear he had seen Government Exhibit 4, the Indication letter, earlier than he actually did. When Allen protested, Sorkin allegedly cautioned him:

"Jerry, you don't have much choice but to go along with us" (tt 2662).

Allen also recalled that the prosecutor ordered him to lie in the Grand Jury (tt 2688, 2688a). He also insisted that the Government asked him to entrap Frank (tt 2946).

Finally, Allen denied he had ever paid Frank \$15,000 (2962).

Under the Court's unbelievable and erroneous ruling, none of the foregoing exculpatory evidence could be considered.

Even assuming arguendo that the Court had a right to strike Allen's testimony with reference to the \$15,000 since his taped conversation with Frank was disallowed, which we think is nonsense, the Court had no right to also categorically strike all of the testimony, such as

the meeting at Bau au Lac; the fact that Frank did not suggest nominees; the preparation of proof of ownership receipts which Allen denied Frank prepared, and so forth.

It is submitted that in United States v. Badalamente and Yagid, docket #74-1517, 1586, at slip opinion, pages 5905 and 5906, this Court has already considered other encounters between Allen and prosecutor Sorkin. This Court reversed Yagid's conviction because of letters alleging pressure by the Government to force Allen to become an unwilling Government witness.

While Allen was characterized as a liar, cheat and scoundrel by Judge Tyler and Mr. Edwards at Allen's sentencing, there seems to be a consistency in his claims of duress and subornation. At the very least, these remarks and facts of his testimony should have been submitted to the jury and not stricken. By striking them, the jury must have inferred that the Government was being vilified for no reason, and/or that the defendants had coached Allen what to say! But how did Allen know what to say in Badalamente and Yagid? That was an earlier case where similar accusations were made. These statements were also against Allen's penal interest since he

had not yet been sentenced (Washington v. Texas, supra).

Frank did not take the stand. Allen's testimony represented an oasis of favorable material in a desert of unfavorable or neutral matter. Under Chambers v. Mississippi, 410 U.S. 284 (1973), the Court should not have stricken Allen's testimony which was favorable to Frank, as it deprived him of essential material necessary for his defense. The reasoning of the Court striking the testimony is fallacious and incomprehensible.

A reversal is mandated by these errors.

POINT III

THE APPELLANTS MOVED TIMELY TO DISMISS THE INDICTMENT ON THE GROUNDS OF IN-ORDINATE DELAY BETWEEN THE ALLEGED DATES OF THE COMMISSION OF THE CRIME AND THE RETURN OF THE TRUE BILL -- A HIATUS OF NEARLY FIVE (5) YEARS. THE RECORD JUSTIFIES THE INFERENCE THAT THE DELAY WAS PURPOSEFUL AND, MOREOVER, THAT APPELLANTS' RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS WERE TRADUCED.

A.

SUCH DELAY IN THE CASE AT BAR WAS EXTREMELY PREJUDICIAL BECAUSE OF THE FACT THAT THE CRUCIAL CO-CONSPIRATOR "BUD" MOSS DIED PRIOR TO THE TRIAL. SUCH DELAYS NOT ONLY LULL PEOPLE INTO A FALSE SENSE OF SECURITY, BUT RESULTS IN A DULLING OF MEMORY, THE POSSIBLE DISCARDING OR DISAPPEARANCE OF DOCUMENTS, AND SIMILAR PREJUDICIAL CONSEQUENCES.

The instant indictment superseded 73 Cr. 1050, which was filed in November of 1973. That indictment charged only Stoller with six counts of making false statements in testimony before the SEC on June 20, 1969. The present indictment was filed in February of 1974 and contained sixteen counts. The latter six counts of the instant indictment are virtually identical to the 1973 Indictment.

The present indictment, under which the conviction herein was obtained, declares that the conspiracy

commenced "on or about the 1st day of June 1968" (p. 2). The "means" paragraph charges various acts and transactions commencing "prior to June 1, 1968" (p. 4), and ending "in May 1969" (p. 9). Fourteen overt acts are alleged. The latest of them is said to have taken place "on or about May 21, 1969" (p. 10). (See Indictment as filed).

The Indictment in the case at bar was filed a mere ninety (90) days before the expiration of the statute of limitations as to the last overt act alleged in the conspiracy count.

We maintain that the delay was not only unnecessary but also was apparently purposeful.

It is clear that the SEC became interested in TWP almost immediately after the last overt act alleged in the present indictment was perpetrated. SEC investigators subpoenaed Mr. Stoller to testify concerning the matter on June 20, 1969, as the indictment itself discloses. Prior to that, on May 27, 1969, the SEC staff took testimony from Elmer H. Moss ("Bud" Moss), the President of TWP. A copy of the transcript of that testimony is

annexed to document number 37, which is a motion by Stoller's attorneys dated August 27, 1974, filed with the docket herein.

Moss, unfortunately, died before the trial of this case. The transcript, however, to which we have just adverted, discloses quite forcefully how important his testimony would have been since it contained what we maintain was exculpatory material in a number of important respects.

It is obvious from the transcript of the SEC testimony of Mr. Moss that its investigation partly started because of a spectacular rise in the market price of the TWP stock which took place in the Spring of 1969.

Our claim, however, does not rest alone upon the unjustified delay between the SEC investigation in 1969 and the indictment in 1974. More important is the fact that Ramon D'Onofrio, who was the most important witness against the appellant in this case, was already acting as a Government agent prior to 1969. He reported to the Government on a regular basis during all periods pertinent to this case.

As this court will recall, D'Onofrio is named as an unindicted co-conspirator in this case (indictment, p. 2). It is alleged that D'Onofrio owned an account at a Swiss bank which was used in connection with the transactions herein alleged, such account having the code name "Gypsy".

It is alleged that D'Onofrio met with Moss in the Spring of 1968 to arrange a public offering of the common stock of TWP.

According to the indictment, D'Onofrio was instrumental in all of the subsequent movements of the stock of TWP directly involved herein. He is, in fact, claimed to have "assigned" 4,900 shares to five nominees (indictment, p. 6).

D'Onofrio was engaged in a number of other transactions essential to the prosecution of this case, as is set forth in the indictment.

This is disclosed in the cases of United States v. Pfingst, 477 F.2d 177 (2 Cir. 1973), cert. denied 412 U.S. 941 (1973) ["Pfingst I"]; and United States v. Pfingst, 490 F.2d 262 (2 Cir. 1973) ["Pfingst II"].

The opinion of the Court of Appeals in this Circuit in "Pfingst I" reveals that D'Onofrio began to cooperate with the Government and met with an F.B.I. agent for this purpose on July 17, 1970 (p. 194). The opinion in "Pfingst II" exposes some of the relationship between D'Onofrio and the Government in more detail. It is there revealed that various negotiations took place between D'Onofrio and the Government concerning evidence to be given by D'Onofrio and undertakings by the Government that he would not be prosecuted on certain charges.

The Government's brief filed in opposition to pre-trial motions in the case at bar expressly concedes that "D'Onofrio was cooperating with the Government as early as 1970 . . ." (pp. 19-20).

According to the affidavit of Milton Gould in the August 27, 1974 motion previously referred to (Document No. 37), he states unequivocally that

"In addition, documentary information has come to our attention indicating that D'Onofrio was working as a Government agent or informer for some years prior to 1970, beginning perhaps as early as 1964." (p. 5).

Motions were made originally to dismiss the indictment, predicated in part on the fact that E.H. Moss, President of TWP, had become seriously ill. A further motion was made when E.H. Moss died, thereby making the prejudice irrevocable and dramatic.

The August 27th affidavit of Milton Gould previously referred to (Document No. 37), sets forth a number of areas wherein Moss would have given exculpatory testimony (e.g.):

"The loss of Mr. E.H. Moss is perhaps even more important. It is unnecessary to speculate what Mr. Moss would have said had he lived and had he been called as a defense witness. This is because he testified at some length concerning the public offering of TWP stock before the SEC on May 27, 1969. A copy of the transcript of his testimony was filed with the Court in connection with the said motion. It will be seen that Mr. Moss flatly contradicted certain important facts alleged in the indictment and seriously undercut other allegations."*

Although the indictment alleges that D'Onofrio met with Moss on several occasions to discuss the underwriting of an issue of TWP common stock, Mr. Moss testified that he "never discussed" with D'Onofrio a proposed public offering of TWP stock at any time prior to the

* Under Anderson v. United States, 417 U.S. 211, Moss' testimony was admissible, not for its truth, but to show that no conspiracy existed. See, too, Lutwak v. United States, 344 U.S. 604.

effective date of the offering (Tr. pp. 9-10).

The indictment accuses that D'Onofrio, Stoller and Allen agreed to obtain a substantial portion of the issue, and then "assign" various shares to nominees. Moss' testimony would have tended to refute this. He testified before the SEC that he had five people to help in the public offering of the TWP stock (Tr. p. 6); he named the five people; they did not include D'Onofrio, Stoller and Allen (Tr. pp. 6-7). Indeed, Mr. Moss said he did not think D'Onofrio had ever purchased any stock of TWP (Tr. p. 43).

The indictment alleges that nearly all of the 42,000 shares issued in the public offering were controlled by Stoller, Allen and D'Onofrio or were purchased by their friends and associates. Moss, however, testified that of the 130 subscribers, 61 subscribed as a result of "independent" letters of inquiry, having no connection with the people helping him in the public offering (Tr. pp. 17-18).

The indictment also alleges an effort to cause the market price of TWP stock to go up by getting brokers to

recommend its purchase. Moss explained the rise in the price of the stock in 1969, however, by reference to potential lucrative contracts between TWP and major industrial corporations and by reference to important publicity TWP received in various journals and trade publications (Tr. pp. 36-37). Citing this publicity, Moss said, "That's the only reason I can give you for the stock going to this price" (Tr. p. 37).

The Government has had the means of prosecuting this action for years. This is not only because of the extensive evidence gathered by the SEC in its 1969 investigation. It is also because D'Onofrio has been cooperating with the Government since at least July 17, 1970. This was revealed in the course of another trial at which D'Onofrio was a principal Government witness. See United States v. Pfingst, 477 F.2d 177, 194 (2d Cir. 1973), cert. den., 412 U.S. 941 (1973). It is believed that D'Onofrio was actually a Government informer or agent for some years prior to that. The Government's own brief in opposition to the earlier pre-trial motions herein expressly conceded that "D'Onofrio was cooperating

with the Government as early as 1970..." (pp. 19-20).

It should also be noted that among the most important allegations in the indictment are claims that defendants Stoller and Frank had various meetings with defendant Allen and co-conspirator D'Onofrio. It is at these meetings that the conspiracy was allegedly hatched and that the details were agreed upon, according to the indictment.

The Government, however, because of its own delay, has been unable to state the dates when these meetings took place, thus preventing the defense from gathering evidence contradicting the Government's claims.

The defense, for example, was precluded from proving that an alleged meeting could not have taken place at the time claimed because Stoller was out of town.

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina v. Robbins, 1 Cox C. C. 114):

"I ought not to allow the case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? . . . [I]f the

charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial." (Emphasis supplied.)

See, 5 Stan. L. Rev. 95, 104, 1952, "Justice Overdue --Speedy Trial for the Pre-Trial Defendant".

In Mann v. United States, 304 F.2d 394, 396-397 (D.C. Cir. 1962), the Court similarly noted:

"Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that the criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime." (Emphasis supplied.)

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In Pollard v. United States, 352 U.S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo,

350 U.S. 857 (1955), affirming Petition of Provoo, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government".

It is apparent from Pollard v. United States, supra, 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. [See Mann v. United States, supra, 304 F.2d at 396-397, n. 4; Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); Nickens v. United States, 323 F.2d 807 (D.C. Cir. 1963); United States v. Provoo, supra.] See 18 U.S.C. §3282.

In Provoo, as in Taylor, delay before trial was one of the combination of factors, which, in sum, affected a denial of the right to a speedy trial. The importance of this factor to the decision in Taylor was emphasized in James v. United States, 261 F.2d 381 (D.C. Cir. 1958), cert. denied, 359 U.S. 930 (1959). The delay in the case at Bar occurred between the alleged commission of the offense and the finding of an indictment, rather than between complaint and indictment or indictment and trial. (cf. Rule 48(b) F.R. Crim. P.). The delay which occurred

herein, is just as prejudicial and serious as any other delay, and clearly should not be immunized from the mandates of the Fifth or Sixth Amendments.

In Godfrey v. United States, 358 F.2d 850, 852, (D.C. Cir., 1966), the Court of Appeals observed:

"We note that, although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purposes of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree. The disadvantage to the accused inherent in the deliberate preference accorded the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

In United States v. Godfrey, 243 F. Supp. 830, 831, (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

"the reasonableness vel non of the

delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case. . . ."

See also, Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). In Ross, the Court of Appeals, (249 F.2d at 211), proclaimed:

" . . . We think a record of this kind more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue, centering around Appellant's ability to defend himself."

In Ross, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in Ross v. United States, supra, the Court was not merely articulating its supervisory power over district courts in Washington, D.C.

See also, Barker v. Wingo, 407 U.S. 514, 531, 533; Dickey v. Florida, 398 U.S. 30, 37-38; Hodges v. United States, 408 F.2d 543, 551 (8 Cir. 1969).

Since United States v. Marion, 404 U.S. 307 (1971), it has become obvious that an indictment may be dismissed notwithstanding the fact that the statute of limitations has not run on the crime.

In United States v. Marion, 404 U.S. 307 (1971), the Court said (p. 324),

" . . . it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment."

The Court said that there can be circumstances in which, as a matter of Fifth Amendment due process, "actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution" (p. 324).

Marion thus confirmed a principle which had already been accepted in this Circuit.

In United States v. DeMasi, 445 Fed. 251 (2d Cir., 1971), cert. den. 404 U.S. 882 (1971), the Court said (p. 253),

" . . . even within the limitation period, if the delay 'impair[s] the capacity of the accused to prepare his defense,' it may nonetheless reach constitutional proportions,

if the prejudice is proven."

See also United States v. Feinberg, 383 F.2d 60 (2d Cir., 1967), wherein the Court said (p. 65),

"Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment."

In United States v. Dornau, 356 F.Supp. 1091 (S.D. N.Y. 1973), the Court said (p. 1092),

"However, the Court in Marion explicitly left open the possibility that a demonstration of 'actual prejudice' stemming from pre-accusation delay might require a dismissal under the Fifth Amendment."

The United States Court of Appeals for the Third Circuit had also reached the same conclusion prior to the Marion decision. In United States v. Rutkowski, 425 F.2d 688 (3rd Cir., 1970), the Court observed that prejudice to the defendant caused by delay might violate his "rights under the due process clause..." (p. 691).

There is a wealth of authority on the question of what constitutes actual prejudice sufficient to require dismissal for delay as a matter of due process of law.

Generally, it is the same sort of prejudice as will require dismissal under the Sixth Amendment for failure to afford an accused a speedy trial. The loss of an important witness or valuable evidence is universally recognized as sufficient prejudice, as is a demonstrable impairment of recollection on the part of either Government or defense witnesses.

Thus, in United States v. Feinberg, *supra*, 383 F.2d 60 (2d Cir., 1967), the Court gave the following examples of the kind of prejudice which will support a due process claim based on pre-arrest delay (p. 65):

"Such a claim may arise if a key defense witness or valuable evidence is lost . . . [citation omitted], if the defendant is unable credibly to reconstruct the events of the day of the offense . . . [citation omitted], or if the personal recollections of the government or defense witnesses are impaired . . . [citation omitted], because if any of these events occur the reliability of the proceedings for the purpose of determining guilt becomes suspect."

The principles announced in Feinberg were reaffirmed in United States v. DeMasi, *supra*, 445 F.2d 251 (2d Cir., 1971), and in United States v. Blauner, 337 F.Supp. 1383

(S.D.N.Y., 1971). In DeMasi, the Court although it affirmed the conviction of the defendant, stated that "even within the limitation period," pre-indictment delay "may nonetheless reach constitutional proportions, if the prejudice is proven" (p. 255). The Court mentioned the following as examples of prejudice (p. 255):

- (a) "derogatory publicity or public disdain" to which a defendant is subjected;
- (b) death or unavailability of "key defense witnesses;"
- (c) inability of potential or actual witnesses to "recall the events of the past;"
- (d) "that evidence was destroyed or mislaid."

In Blauner, the Court, dismissing the indictment, considered pre-indictment delay. It said (p. 1390),

"The 1968 indictment at issue herein charges a conspiracy and other criminal activity which at present date back between approximately seven and nine years. Although the charges, when filed, were not time-barred by the applicable limitations periods, the pre-indictment period is not thereby eliminated from consideration of the cumulative effect of the delay. The statute of limitations

is not 'the sole constitutional measure of permissible Sixth Amendment [pre-indictment] delay', . . . [citation omitted]. The Government may not blissfully defer prosecution during the limitations period, . . . [citation omitted] since a prejudicial or deliberate delay occurring within the statutory period may deprive a defendant of his constitutional right to a speedy trial."

* * *

"The instant situation, of course, presents a significant period of pre-indictment delay, which even if excusable, was attended with the death of one potential defense witness and the loss of records and documents." (Emphasis added.)

The kind of prejudice described in the foregoing cases is precisely the kind of prejudice which has occurred here. A witness who, from his SEC testimony, would clearly have contradicted important allegations in the indictment has died. Recollections have dimmed to the point where the Government is unable to specify the dates on which crucial meetings took place. Indeed, important documents may have been lost or destroyed.

Actual prejudice resulting from the delay having been shown, the indictment should be dismissed.

POINT IV

DUE PROCESS OF LAW REQUIRES REVERSAL OF APPELLANT FRANK'S CONSPIRACY CONVICTION SINCE HE WAS ACQUITTED OF ALL OF THE SUBSTANTIVE COUNTS OF THE INDICTMENT. THE SUBSTANTIVE COUNTS NECESSARILY ENCOMPASSED CONSPIRATORIAL ACTIVITY.

In Counts Two through Ten which are the so-called substantive counts of which appellant Frank was indicted, Count One having been the conspiracy, it is manifest that necessarily conspiratorial action was required to even entertain a conviction under the substantive acts.

It is obvious from a perusal of the indictment, which was presented to the jury, that each substantive count, that is Two through Ten inclusive, necessarily depended upon paragraph "5" of the conspiracy count, Count One, which paragraph was incorporated fully into each of the substantive acts alleged. Thus, in each of the counts, Two through Ten, the following is set forth in the indictment:

"The allegation contained in paragraph 5 of count one of this indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in paragraph 1 of this count."

The foregoing is a quotation with respect to Count Two, but the same quotation exists with respect to counts Three through Ten inclusive as well.

In addition, a perusal of Counts Two through Ten inclusive makes it manifest that the mutual cooperation of at least two persons is absolutely essential to establish the proof necessary to convict of any of the substantive Counts Two through Ten.

When appellant Frank refers to conspiratorial activity with respect to the substantive charges Two through Ten, what we are actually maintaining is that necessarily two or more persons were engaged in, and necessarily had to be involved in the activities which were the subject matter of the respective substantive counts hereinbefore alluded to.

For over a century our Courts have applied "Wharton's Rule" in holding that where a substantive crime included as one of its elements a conspiracy to commit that crime, an additional conviction for conspiracy was unacceptable. Wharton's Rule, in its simplest form, states:

"When to the idea of an offense
plurality of agents is logically

necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."*

Wharton's Rule was adopted by this Court in the landmark case of United States v. Zeuli, 137 F.2d 845, (2d Cir. 1943), where Judge Learned Hand wrote:

"If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it."**

The Supreme Court approved this rule of law in Gebardi v. United States, 287 U.S. 112, 122 (1932), where it held:

". . .where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statutes."***

* 2 Wharton, Criminal Law, §1604, at 1862 (12th Ed. 1932).

** See United States v. Central Veal & Beef Company, 162 F.2d 766 (2d Cir. 1947); United States v. DiRi, 159 F.2d 818 (2d Cir. 1947); United States v. Bayer, 156 F.2d 964 (2d Cir. 1946); United States v. Sager, 49 F.2d 725 (2d Cir. 1931); United States v. Hagan, 27 F.Supp. 814 (W.D. Ky. 1939); United States v. New York Central & H.R.R. Company, 146 F. 298 (Cir. Ct., S.D. N.Y., 1906).

*** See United States v. Katz, 271 U.S. 354 (1926); United States v. Holte, 236 U.S. 140 (1915).

See also, United States v. Zane, 507 F.2d 346 (2d Cir. 1974).

Recently the United States Supreme Court reversed this Court in United States v. Becker, 461 F.2d 230 (2d Cir. 1972), reversed 417 U.S. 903, 94 S.Ct. 2597 [May 28, 1974]. The reversal was on other grounds, but is portentous.

We also submit that in view of United States v. Alsondo** the slate has been wiped clean for a fresh analysis of the issue involved.

We urge this Court to reassert the superior rationale of the Zeuli case.* The disfavor expressed by the Supreme Court for attempts "to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions", should sway this Court to strike down the superfluous conspiracy count in the present indictment. Grunewald v. United States, 353 U.S. 391, 404 (1957). See Krulewitch v. United States, 336 U.S. 440 (1949).

The prejudice generated by the prosecution's ill-advised addition of the conspiracy charge is very real.

* See Note, 30 Wash. & Lee L. Rev. 613, 621 (1973); (See also Bell v. United States, 349 U.S. 81 [1955]). Note, 59 Iowa L. Rev. 452, 463 (1973).

** The reasoning of United States v. Alsondo, 2 Cir 1973, 486 F.2d 1339 is compelling as well and fortifies appellants position that acquittal on substantive crimes precluded sustaining the conspiracy. See also, United States v. Heckman, 3 Cir. 1973, 479 F.2d 726.

In addition to added punishment via fines and imprisonment, the conspiracy addendum opens the floodgates for hearsay evidence at trial. The Government extensively uses various means to gather statements by various participants in the alleged transgression of law. We have seen in the case at bar what lengths the Government went to get statements or at least some conversations between Allen and Frank by setting up a "straw man" in the figure of Allen to coax and cajole and entice Frank into having a conversation with him concerning the case.

Thus, evidence ordinarily receivable only against a particular individual, is made binding upon all of the alleged co-conspirators by virtue of the inclusion of a conspiracy count.*

*See Developments in the Law--Criminal Conspiracy, 72 Har. L. Rev. 920, 923 (1959), where one legal commentator has addressed himself to this very problem:

"By means of evidence inadmissible under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in con-

In Krulewitch v. United States *supra*, Justice Jackson, after a survey and criticism of the federal law of conspiracy declared (336 U.S. at 457):

"There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evil doers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges . . . and I think there should be no straining to uphold any conspiracy conviction where [as herein] the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In Glasser v. United States, 315 U.S. 60, 75, 76 (1942), the Supreme Court explained:

* (Cont'd.)

viction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."

See also United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), *aff'd* 311 U.S. 205 (1940); Note, The Conspiracy Dilemma; Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 277 (1948).

"In conspiracy cases . . . liberal rules of evidence and wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant . . ."

As a practical matter, the jury does not distinguish between the separate defendants' cases when conspiracy has been charged. The indiscriminating jury deliberations in cases like these are the real motivation for the adding of a separate conspiracy charge to a substantive crime which includes conspiracy as one of its elements. This Court is thus given another opportunity to express its displeasure and disagreement with this ever-mushrooming prosecutorial practice. Prosecutors must be told, once and for all, that our system of criminal justice does not tolerate such unfair tactics.

There is no question but that the use of a conspiracy count permitted the introduction of evidence otherwise inadmissible.

In United States v. Falcone, 109 F.2d 579 (2 Cir., 1940), aff'd. 311 U.S. 205 (1940), Judge Learned Hand of this Court aptly declared (id. 581):

". . . Today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been

associated in any degree whatever with the main offenders . . . there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

For the foregoing reasons, therefore, the judgment of conviction should be reversed and the indictment dismissed, or, in the alternative, a new trial should be granted.

A.

APPELLANT FRANK, WHO WAS AN ATTORNEY AT LAW, BY GIVING ADVICE TO SOME OF THE ALLEGED PARTICIPANTS IN THE CRIME, DID NOT MAKE HIM A MEMBER OF ANY CONSPIRACY. AT MOST, HE WAS A "CASUAL FACILITATOR" AND NOT A CO-CONSPIRATOR.

We must bear in mind that Frank was acquitted of the substantive charges Two through Ten. The language of the substantive charges, however, contained all of paragraph Five of Count One and a perusal of those charges indicates that much of the alleged conspiratorial actions among the so-called conspirators was also included within the purview of Counts Two through Ten.

Frank was an attorney at law. He did render advice. His activities were not that of a co-conspirator in the sense

that he initiated the so-called transgressions of law. His alleged guarantee of signatures was not ipso facto conspiratorial. Nor was his activity as a notary.*

He rendered advice, but that is the function of any attorney.

We think it is appropriate for this Court to consider its own recent decision in United States v. Hysohion, (2 Cir. 1971), 448 F.2d 343 at 347, where this Court explained:

"We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere casual facilitator' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' United States v. Agueci, 310 F.2d 817, 828 (2 Cir. 1962), cert. denied, Guippone v. United States, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed. 2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between

* The refusal to permit "Bud" Moss' testimony into evidence was error. Out-of-Court statements of a co-conspirator are admissible, the Supreme Court held, to determine if there is a conspiracy at all. Anderson v. United States, 417 U.S. 211.

that seller, who was Roupinian, and Rim-
baud."

In United States v. Peoni, 100 F.2d 401, 403 (2 Cir.
1938), Judge Learned Hand explained:

"Nobody is liable in conspiracy except
for the fair import of the concerted
purpose or agreement as he understands
it."

In United States v. Andolscheck, 142 F.2d 503, 507
(2 Cir. 1944), this Court further elucidated:

"It is true that at time courts have
spoken as though, if A makes a criminal
agreement with B, he becomes a party to
any conspiracy into which B may enter, or
may have entered, with third persons.
That is of course an error; the scope of
the agreement actually made always measures
the conspiracy, and the fact that B engages
in a conspiracy with others is as irrelevant
as that he engages in any other crime."
(Emphasis added).

In the recitation of facts, and in other portions
of this brief, we maintain that it becomes apparent that
appellant Frank was not a member of the conspiracy. We
have already adverted to the fact in another Point, that
a conspiracy should not have been alleged altogether in
view of the fact that the substantive crimes embraced
the conspiratorial acts and allegations almost completely.

In accord with the Hysolion rule that a person not connected or just a "mere casual facilitator" is not criminally liable, we also call this Court's attention to such cases as United States v. Vilhotti, 452 F.2d 1186 (2 Cir. 1971); United States v. Casalnuovo, 350 F.2d 62 (2 Cir. 1971); and United States v. Euphemia, 261 F.2d 441 (2 Cir. 1958).

We stress that we maintain that there was insufficient evidence altogether to inculcate Frank. We advance the argument in this point only if this Court deems it necessary to reach beyond the sufficiency claim.

POINT V

THE APPELLANTS HAD DEMANDED 3500 MATERIAL FROM THE PROSECUTION CONCERNING ANY LINK-UP OR COOPERATION THE MAIN WITNESS D'ONOFRIO HAD WITH THE GOVERNMENT. WHILE SOME MATERIAL WAS SUPPLIED, THE COURT BELOW PAID NO HEED TO THE DEFENSE CHARGES THAT THE GOVERNMENT HAD PROBABLY SUPPRESSED OTHER ITEMS.

A.

THE SENTENCING OF D'ONOFRIO TOOK PLACE SHORTLY AFTER THE CONVICTIONS HEREIN, AND REVEALS THAT IT IS HIGHLY LIKELY THAT OTHER MATERIAL, NOT DISCLOSED TO THE APPELLANTS, WAS IN THE HANDS OF THE GOVERNMENT.

To point to the witness D'Onofrio as the main Government witness would no doubt meet with no challenge from the prosecution. The Government conceded that D'Onofrio had been cooperating with the Government since 1970. That he was a liar, cheat and thief is borne out by the statements of the witness himself as well as Government 3500 material supplied.

As has been noted in another point of this brief, Counsel for Stoller, in an affidavit, declared that documentary evidence had been acquired showing that D'Onofrio had been cooperating with the Government for at least a half dozen years prior to 1970, that is, as early as

1964. This was not revealed by the prosecution and no opportunity to confront him on any such material was afforded.

At his sentencing on November 8, 1974 before Judge Briant (72 Cr.884, 1221; 73 Cr.192, 654), the Court acknowledges receipt of a confidential sentencing memorandum from the Government which it ordered sealed and returned to the prosecution. The Court noted that the memorandum probably contained valuable 3500 material!

Appellant Frank's appellate counsel specifically asked to be permitted to see the sentence memorandum on the D'Onofrio sentence, but the trial prosecutor, Mr. Sorkin, categorically refused to do so citing, inter alia, that D'Onofrio's life might thereby be jeopardized.

We now ask this Court to direct that the sentencing memorandum of D'Onofrio be handed up to this Court in camera, so that it can at least determine if matters are therein contained with which D'Onofrio might have been confronted as 3500 or Brady material.

The colloquy supporting appellant's charge is set forth in the sentencing minutes of D'Onofrio, e.g. (p. 7):

"The Court: A paymaster among thieves. That's Judge Desmond's expression of what I am charged with today. I want to make it very clear to you that except for your cooperation I'm prepared to impose a very substantial sentence on you, but I must and will give great consideration to the fact that you stood up and testified and abjured cross-examination and your testimony stood up and you were instrumental in giving up a Supreme Court Justice who was a crook. You were instrumental in a conviction before Judge Tyler. You have done other work in the public interest, which is disclosed in the memoranda but which I really think ought not to be publicly stated.

The Defendant: I prefer not also, your Honor.

The Court: I think these memoranda might very well be sealed or withdrawn by the Government."

The sentencing minutes of D'Onofrio, further corroborating our accusations reveal on pages 12 and 13 thereof:

"Mr. Mogul: Yes, your Honor. Your Honor, as to the matter of the sentencing memorandum submitted by the Government, my application would be as follows: That all memoranda be returned to the Government. I think that would be the most secure --

The Court: I think that is reasonable. Frankly, these memoranda

present a difficulty. I often wonder whether they would constitute 3500 material or Brady material if you tried to use this man as a witness in some other case. So I'll physically return the sentencing memorandum to the United States Attorney's Office. So the record may be clear what they are, I am going to mark them as Court's Exhibit 1 and 2 for identification, in this proceeding.

Mr. Mogul: Your Honor, there is one more matter in this case --

The Court: Exhibit tags are not to be removed."

At trial the Government never conceded that D'Onofrio had been promised 18 months to be served at Egland Air Force base in Florida as a reward for cooperation. A witness testified that D'Onofrio had bragged about this before his sentence (See testimony of Melvin Hiller).

Pages 8 and 11 of the said sentencing minutes, however, disclose that D'Onofrio was in fact sentenced to 18 months at Egland, and was fined, but that the fine was not a committed fine.

We have already referred to the Badalamente and

Yagid case, supra. The letter of Jerome Allen which referred to great pressure and threats by the same prosecutor who handled the case at bar, was held by this Court to be 3500 material, and since the credibility of Allen was most vital, this tribunal declared that the non-disclosure of that letter was reversible error (Badalamente, slip op. p. 5908-5909):

"We have no doubt that the letter to the trial judge and the letters to other Government officials were Jencks Act material, that they had a direct bearing on the persuasiveness of Allen's testimony, and that their nonproduction was reversible error warranting the reversal of Yagid's conviction and the award of a new trial. United States v. Sperling, ___ F.2d ___ (Nos. 72-2363, et al., 2 Cir., October 10, 1974). United States v. Pacelli, 491 F.2d 1108, 1119 (2 Cir. 1973);² United States v. Pfingst,

² "United States v. Sperling and United States v. Pacelli are of special interest because both involved the non-production of letters, in the possession of the prosecutor, written to public officials by significant government witnesses. Both cases hold the nonproduction of a violation of 18 U.S.C. §3500. In Pacelli, the conviction of the single appellant was reversed and a new trial awarded. In Sperling, upon an analysis of the prejudicial effect of nonproduction in the light of the other evidence in the case, the convictions of some appellants were reversed while others were affirmed on the harmless error doctrine. in the instant case, we think, as developed in the text,

477 F.2d 177, 194-95 (2 Cir. 1973); United States v. Polisi, 416 F.2d 573, 577-79 (2 Cir. 1969). See also United States v. Mayersohn, 452 F.2d 521 (2 Cir. 1971). Although the prejudicial failure to produce the material in accordance with 18 U.S.C. § 3500 is enough to require reversal and a new trial, we think that as the trial continued after Yagid testified--where his testimony made the credibility of Allen crucial to the determination of Yagid's guilt or innocence--the nonproduction of the Allen letter to the trial judge and the Allen letters to other public officials was a violation of the rule in Brady v. Maryland, 373 U.S. 83, 87 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Since D'Onofrio in the case at bar, is certainly as important as Allen was in the Badalamente case, and his credibility is paramount, we submit that if there is anything in the sealed and suppressed report on D'Onofrio which was shown to Judge Brieant that could be

² (Cont'd.)

that reversal is ineluctable. The stand-off between the testimony of Olsberg, an impeachable witness, and Yagid, also impeachable, may well have been resolved only by the testimony of Allen whose credibility may have been subject to further serious attack."

helpful or exculpatory to Frank, then it should be divulged and the conviction ought to be reversed.

As was said in the argument in Kolod v. United States, 390 U.S. 136, 138, ex parte determinations of what should be divulged are impermissible. The argument noted:

"When a government winces at full disclosure in cases such as this, it is a government that has lost its taste for freedom."

See also, Alderman v. United States, 394 U.S. 165.

In addition to the foregoing, appellant had sought production of a memorandum apparently prepared by the United States Attorney for the Eastern District of New York pertaining directly to the activities of Raymond D'Onofrio, as well as other notes and memoranda concerning D'Onofrio's dealings with the said United States Attorney, the F.B.I. and the United States Attorney in the Southern District of New York.

The Government reimbursed D'Onofrio to the tune of about \$31,000.00 for alleged travel between Las Vegas and New York, most from Friday to Monday. It is hard to conceive of so large a sum be expended on such travel

alone. We wonder if the suppressed reports and memoranda might shed some light on this aspect as well.

We ask that this Court direct that these materials at least be handed up to this Court in camera to determine whether any possible prejudice flowed to appellant by the omission to furnish these documents.

If, for any reason, the appellant is not accurate in his sincerely held belief that these exist, let the appellee make such a representation.

We urgently request, however, that the appellee not be permitted to subjectively determine what it considers "relevant", but that this Court be given anything dealing with D'Onofrio which was known or extant at the time of the trial or before herein, so that this impartial tribunal can make an objective finding.

This Court is of course aware of the role of D'Onofrio in the so called Pfingst I and Pfingst II cases already cited. In United States v. Pfingst, supra, this Court reviewed the relevant legal principles involved in deliberate or innocent withholding of material information or evidence (390 F.2d at 275).

"Having established the parameters of the government's nondisclosure, we must now determine whether, in the context of this case, either for prophylactic reasons or considerations of fairness to the defendant, such nondisclosure requires a new trial. We said in Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961),

'The reason why the showing of prejudice required to bring down the balance in favor of a new trial will vary from case to case is that the pans contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," People v. Savvides, supra, and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse. See Mapp v. Ohio, 367 U.S. 643, 650-653, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In other cases, where the conduct of the trial has been less censurable, or not censurable at all, a greater showing of prejudice is demanded, because the interest in obtaining an ideal trial, with the trier of the facts considering all admissible evidence that has ever become available, and nothing else, is not thus supplemented and may be outweighed by the interest in avoiding a retrial unlikely to have a different outcome -- an interest especially weighty when, as is normally true on collateral attack, the second trial will come long after the first.'

"In United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982, 93

S.Ct. 2270, 36 L.Ed.2d 958 (1973)
we recently reiterated the governing
standard where nondisclosure is the
result of prosecutorial misconduct.

'If it can be shown that the govern-
ment deliberately suppressed the evi-
dence, a new trial is warranted if the
evidence is merely material or favor-
able to the defense. [citations omit-
ted]. The same rule applies, even in
the absence of intentional suppression,
if it appears that the high value of
the undisclosed evidence could not
have escaped the prosecutor's atten-
tion. [citations omitted]. In each of
these instances, the materiality of the
evidence is measured by the effect of
its suppression upon preparation for
trial, rather than its predicted effect
on the jury's verdict. [citations omit-
ted.]'''

POINT VI

THE COURT'S CHARGE WAS ERRONEOUS IN SEVERAL RESPECTS AS DETAILED IN PART BELOW:

- 1- THE COURT ERRONEOUSLY LED THE JURY TO BELIEVE FRANK MADE A THREATENING CALL TO BONAVIA (tt 3588).

The Court indicated on 3587 and 3588 of the transcript that Frank may have made threatening calls to Bonavia. The testimony belies this inference, since the call to Bonavia was not initiated by Frank. No threat by Frank was made.

- 2- THE COURT ERRED IN ASKING THE JURY TO CONSIDER WHETHER STOLLER, ALLEN AND D'ONOFRIO WERE UNDISCLOSED UNDERWRITERS, AND WHETHER FRANK KNEW OF THIS, SINCE THIS CHANGED THE THEORY OF THE CASE.

Section 5 of the Conspiracy Count (Count 1) does not spell out the theory of undisclosed underwriters. Yet that was the theory espoused by the Government at the close of the case, and was so charged by the Court. This was a complete surprise to Frank and prejudiced his defense.

While at tt 2219-2221, the Government says that in Count 2, Frank knew that the Government was alleging un-

disclosed underwriters as a theory, we do not think it is that clearly spelled out from the record as a whole. In either case, however, since Frank was acquitted on Count 2, he should now be deemed acquitted of the conspiracy aspect as well.

- 3- ALTHOUGH COUNT 1, PARAGRAPH 5(r) ALLEGING RECEIPT BY FRANK OF \$15,000 AS HIS STAKE IN THE SCHEME WAS DISMISSED ON CONSENT OF THE APPELLEE, NEVERTHELESS THE COURT REFUSED TO INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S ARGUMENT THEREON IN SUMMATION.

The Government consented to the dismissal of Paragraph 5(r) of Count 1 of the indictment. Yet in its summation, it referred to that stricken allegation (3459, 3460), over objection. Allen's declaration that Frank never got \$15,000 was, however, stricken on motion by the Government.

- 4- THE COURT REFUSED APPELLANT'S REQUEST 26, ASKING THAT IF THE JURY BELIEVED MARILYN HERZFELD THAT FRANK DIDN'T MEET D'ONOFRIO UNTIL THE MIDDLE OF 1969, INSTEAD OF 1968: THEY MUST ACQUIT.

THE COURT ALSO REFUSED TO CHARGE APPELLANT'S REQUEST 27 THAT IF THE JURY BELIEVED PFINGST'S TESTIMONY THAT HE NEVER MET WITH STOLLER, ALLEN AND

D'ONOFRIO TO PLAN THE TWP MANIPULATION, AND THAT HE NEVER DRAFTED THE INDICATION LETTER (EXH. 4), THAT THEY SHOULD ACQUIT.

The foregoing requests 26 and 27 came from witnesses who contradicted essential allegations of the self-confessed liar, cheat and swindler, D'Onofrio. The Court should have charged that if the jury believed this testimony, it would have to acquit Frank. It did not so charge. The Government supposedly vouch for the credibility of all its witnesses.

POINT VII

THE COURT ERRED IN FAILING TO GRANT A SEVERANCE OF COUNTS 11-16 SINCE THEY DEALT ONLY WITH STOLLER AND NO JURY COULD BE EXPECTED TO CONCENTRATE ON OR PERFORM THE MENTAL GYMNAS TIC OF ONLY CONSIDERING THESE COUNTS AGAINST STOLLER. THIS IS ESPECIALLY TRUE SINCE THERE WAS A CONSPIRACY ALLEGED.

The appellant timely moved for a severance of Stoller's Counts 11-16 charging Stoller with a violation of 18 U.S.C. 1001. These counts had nothing to do with Frank. Yet the jury was permitted to hear about them and had to consider evidence thereon.

Frank necessarily had to be prejudiced since it was not a crime for which he was charged. Yet, in the context of a conspiracy trial where the Court let it be known that statements of one conspirator may be binding on others, the jury must have been faced with an impossible mental gymnastic to restrict its consideration of the evidence on 11 through 16 (actually 14 and 16) to Stoller. (See, Bruton v. United States, 391 U.S. 123; United States v. Bozza, 2 Cir. 1966, 365 F.2d 206, 215; and Nash v. United States, 2 Cir. 1932, 54 F.2d 1006, 1007).

Indeed it has been held that a man cannot be confronted with wholly uncharged crimes, even if related to the subject matter of the instant case.

"The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime, even though of the same nature is not admissible."

United States v. Modern Reed & Rattan Co., 2 Cir. 1947, 159 F.2d 656, 658, cert. denied 331 U.S. 831.

See, too, Wilborg v. United States, 163 U.S. 632; United States v. Atkinson, 297 U.S. 157; Gomila v. United States, 5 Cir., 146 F.2d 372 and United States v. Tamalolo, 2 Cir. 1957, 249 F.2d 683.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed; or in the alternative, a new trial should be ordered.

Respectfully submitted,

Irving Anolik
Attorney for Appellant
Martin Frank

Irving Anolik
Donald Derfner
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
-against-
PHILLIP STOLLER and MARTIN FRANK,
~~XXXX~~
Defendants-Appellants

JEROME ALLEN and ALFRED T. HERBERT,
Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th Street, New York, New York
That on the 14th day of March 1975 ~~XXXX~~ at U.S. Courthouse, Foley Square, N.Y.
deponent served the annexed *BRIN* N.Y.
upon

Paul J. Curran U.S. Attorney Southern District

the Attorney in this action by delivering ³ true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 14th
day of March 1975 ~~XXXX~~

James Steele
Print name beneath signature

JAMES STEELE

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

Also: Anderson Russel Kill & Chick
635 5th Ave
New York N.Y.

